

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

DAVID B. NEWMAN and IRA F/B/O
DAVID NEWMAN-PERSHING LLC as
Custodian, on behalf of themselves and all
Others Similarly Situated, and Derivatively on
behalf of FM LOW VOLATILITY FUND, L.P.,

Plaintiffs,

v.

FAMILY MANAGEMENT CORPORATION,
SEYMOUR W. ZISES, ANDREA L. TESSLER,
ANDOVER ASSOCIATES LLC I, ANDOVER
ASSOCIATES MANAGEMENT CORP.,
BEACON ASSOCIATES LLC I, BEACON
ASSOCIATES MANAGEMENT CORP.,
JOEL DANZIGER, HARRIS MARKHOFF,
IVY ASSET MANAGEMENT CORP., THE
BANK OF NEW YORK MELLON CORP.
MAXAM ABSOLUTE RETURN FUND, LP,
MAXAM CAPITAL MANAGEMENT LLC,
MAXAM CAPITAL GP, LLC, MAXAM
CAPITAL MANAGEMENT LIMITED,
SANDRA MANZKE, and JOHN DOES 1-100,

Defendants,

and

FM LOW VOLATILITY FUND, L.P.,

Nominal Defendant.

08 Civ. 11215 (LBS)

**MEMORANDUM OF LAW
IN OPPOSITION TO THE
PLAINTIFFS' MOTION TO
ALTER OR AMEND THE
JUDGMENT AND FOR LEAVE
TO AMEND THE COMPLAINT**

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PRELIMINARY STATEMENT

Defendants Beacon Associates Management Corp. (“Beacon Management”), Andover Associates Management Corp. (“Andover Management”), Joel Danziger (“Danziger”) and Harris Markhoff (“Markhoff”) (collectively referred to herein as the “Beacon Defendants”) respectfully submit this memorandum of law in opposition to Plaintiffs’ Motion to Alter or Amend the Judgment and for Leave to Amend the Complaint, dated November 17, 2010.

ARGUMENT

Plaintiffs filed their initial complaint on December 23, 2008 and, subsequently, on May 4, 2009, amended their complaint. On July 13, 2009, the defendants, including the Beacon Defendants, moved to dismiss Plaintiffs’ First Amended Class Action and Derivative Complaint. On September 16, 2009, rather than opposing the pending motions to dismiss, plaintiffs once again sought to amend their complaint by filing a Motion for Leave to Amend, and attaching a proposed second amended complaint. Thereafter, the plaintiffs withdrew that proposed pleading and filed a renewed Motion for Leave to Amend, attaching a Second Amended Class Action and Derivative Complaint (the “Second Amended Complaint”), dated November 5, 2009, their third complaint in this action. Each of the defendants moved to dismiss the Second Amended Complaint by motions dated February 16, 2010 and April 2, 2010, and plaintiffs opposed the defendants’ motions to dismiss on April 16, 2010 and June 1, 2010. In those oppositions, the plaintiffs specifically requested that if any of their claims be dismissed, that they be granted leave to further amend their complaint. In dismissing all of plaintiffs’ claims, this Court in its October 20, 2010 Order, explicitly denied plaintiff’s requests to further amend their pleadings. (See Order at 20 n. 10.)

The Beacon Defendants oppose plaintiffs' latest, and post-judgment attempt to amend for substantially the same reasons as set forth by defendants Maxam Capital Management LLC, Maxam Capital GP, LLC, Maxam Capital Management Limited, and Sandra Manzke (the "Maxam Defendants") as well as Ivy Asset Management LLC and the Bank of New York Mellon Corporation (the "Ivy Defendants") in their memoranda of law in opposition to plaintiffs' motion to alter or amend the judgment and for leave to amend their complaint. As plaintiffs lack standing to pursue their claims against the Maxam Defendants and the Ivy Defendants, plaintiffs also lack standing to bring their claims against the Beacon Defendants, either directly, or derivatively on behalf of the FM Low Volatility Fund, L.P. Accordingly, in the interest of judicial efficiency, the Beacon Defendants adopt and incorporate each of the arguments raised by the Maxam Defendants and Ivy Defendants.

Among other things, the plaintiffs' motion is procedurally improper under Local Rule 6.3 which requires a motion for reconsideration or reargument of a court order determining a motion to be served within fourteen (14) days after entry of the judgment. The Court's Order was entered on October 20, 2010 and the instant motion was not filed until November 17, 2010, and is thus, untimely. Notwithstanding its untimeliness, as detailed in the memoranda submitted by the Ivy Defendants and the Maxam Defendants, plaintiffs' motion fails to satisfy the substantive requirements for the "extraordinary remedy" of reconsideration under Local Rule 6.3. Plaintiffs' motion similarly fails to meet the requirements of Fed. R. Civ. P. 59. As noted by the Court in its Order dismissing plaintiffs' claims, any further amendment would be futile and thus this application must be denied.

CONCLUSION

For the foregoing reasons, and those set forth more fully by defendants Maxam Capital Management LLC, Maxam Capital GP, LLC, Maxam Capital Management Limited, and Sandra Manzke (the "Maxam Defendants") as well as Ivy Asset Management LLC and the Bank of New York Mellon Corporation (the "Ivy Defendants"), in their memoranda of law in opposition to plaintiffs' motion to alter or amend the judgment and for leave to amend their complaint, defendants Beacon Associates Management Corp., Andover Associates Management Corp., Joel Danziger, and Harris Markhoff respectfully request that the Court deny plaintiffs' motion in its entirety.

Dated: New York, New York
December 17, 2010

ROSENFELD & KAPLAN, L.L.P.

By: 

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